80-697

Supreme Court, U. S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COALITION TO PRESERVE HOUSTON
AND THE HOUSTON INDEPENDENT
SCHOOL DISTRICT, et al.,

Appellants,

v.

INTERIM BOARD OF TRUSTEES OF
THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

WILLIAM PANNILL
PANNILL AND HOOPER
1100 Milam Building
Houston, Texas, 77002
(713) 659-8090
Attorney for Appellants

Of Counsel:
GARY CATRON

QUESTIONS PRESENTED

1. Whether, pursuant to the Voting Rights Act Amendments of 1975 and this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978), the prevailing party in litigation to prevent the formation of a white splinter school district must collect attorneys' fees only from the abortive district rather than the state government or the county board of education.

2. Whether the three-judge court properly ignored the element of contingency in awarding attorneys' fees under the Voting Rights Act Amendments comparable to those granted in complex private litigation.

PARTIES BELOW

The plaintiffs in this case were two individuals and the Coalition to Preserve Houston and the Houston Independent School District, an unincorporated association consisting of individual citizens and other associations.[1] The individual plaintiffs, Gurney F. Pearsall and Danny Lawson, are members of the Negro race who live within the boundaries of the proposed Westheimer Independent School District. The United States filed a later suit, and the two cases were consolidated.

The defendants were the interim board of trustees of the Westheimer Independent School District and each member of the interim board.[2] Following an election held on January 15, 1977, the plaintiffs' complaint was amended to name the permanent board and each individual member.[3]

---

[1] The names of the members of the Coalition are reprinted in Appendix E.

[2] The members of the interim board named in the plaintiffs' complaint were: Joel Coolidge, Mrs. Jackie Day, Arthur Alvarez, William Hoffman, and Mrs. Susie Vandiver, who died during the pendency of this litigation.

[3] The members of the permanent board named in the plaintiffs' amended complaint were: Coolidge, Wiley B. Harle, R. M. Johnson, George J. Kostas, James R. Lederer, Don R. Mabray, and William N. Wilson.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions	2
Statement of the Case	2
Summary of Argument	6
The Questions are Substantial	6
I. Congress intended both the States and their local agencies to have ultimate liability for all attorneys' fees awards under the Voting Rights Act against local officials	6
II. The three-judge court abused its discretion in setting a fee award based strictly on time spent because Congress intended that fees under the Voting Rights Act be awarded on the same basis as in private litigation and take into account the element of contingency	11
Conclusion	13

Appendices

Memorandum and Order, *Coalition to Preserve Houston, et al.* v. *Interim Board of the Westheimer Independent School District, et al.*, No. H-77-92, et al. (United States District Court for the Southern District of Texas) (3-judge court)	A
Memorandum and Order, *Hereford Independent School District* v. *Bell*, 454 F. Supp. 143 (United States District Court for the Northern District of Texas) (3-judge court)	B
Final Judgment	C
Notices of Appeal	D
List of Members of the Coalition to Preserve Houston and the Houston Independent School District	E

TABLE OF AUTHORITIES

Page

Cases

Gomillion v. *Lightfoot*, 346 U.S. 339 (1960) 7
Hereford Independent School District v. *Bell*, 454 F.Supp. 143 (N.D. Tex. 1978) 1, 3
Hutto v. *Finney*, 437 U.S. 678 (1978) ..... i, 5, 6, 8, 9
Ross v. *Houston Independent School Dist.*, 559 F.2d 973 (5th Cir. 1977) 2, 3
Ross v. *Houston Independent School Dist.*, 81 F.R.D. 532 (S.D. Tex. 1979) 2, 4, 7
Ross v. *United States*, 583 F.2d 712 (5th Cir. 1978) 2, 7
Stanford Daily v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) .. 11
United States v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978) 3, 10
Westheimer Independent School District v. *Brockette*, 567 S.W.2d 780 (Tex. 1978) 2, 3, 10

Other Authorities

S. Rep. No. 94-295, 94th Cong. (1st Sess.) 8, 9, 11

Statutes

Texas Education Code § 19.263 (1972) 3, 10
Texas Education Code § 17.01 et seq. 9
Voting Rights Act of 1965, 42 U.S.C. § 1973(*l*)(e) (Supp. 1980) 2
28 U.S.C. § 1253 (1970) 2

OPINIONS BELOW

The opinion of the three-judge court in the consolidated case of *Hereford Independent School District* v. *Bell* is reported at 454 F. Supp. 143 (N.D. Tex. 1978). The opinion of the three-judge court below has not been reported. *See* App. A, *infra.*

STATEMENT OF JURISDICTION

The Coalition to Preserve Houston and the Houston Independent School District, Gurney F. Pearsall, and Danny Lawson (hereinafter the "Coalition"), appeal from the final judgment of a three-judge court in the United States District Court for the Southern District of Texas dated July 1, 1980, which dissolved the permanent board of the Westheimer Independent School District (hereinafter "Westheimer"), and thereby foreclosed Westheimer's access to public funds under Texas law. The lower court awarded attorneys' fees of $44,484.21 to the appellants under the Voting Rights Act of 1965 collectible only from Westheimer. The award was based entirely on time spent, and the judgment denied the plaintiffs' request to collect this award from the State of Texas, the Texas Education Agency, or the Harris County Board of Education.

A motion for rehearing was served by the elected board of the Westheimer Independent School District on July 11, 1980, and overruled on August 27, 1980. *See* p. C-4, *infra.* Notices of appeal were duly filed by the Coalition on August 25, 1980, and October 16, 1980. See pps. D-1-8, *infra.* Thus this jurisdictional statement is being filed within 60 days of the overruling of the Westheimer motion for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATUTORY PROVISIONS

Section 14(e) of the Voting Rights Act of 1965, as amended, provides

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973(*l*)(e) (Supp. 1980).

STATEMENT OF THE CASE

Acting "in deliberate defiance" of the Voting Rights Act of 1965, the interim board of the Westheimer Independent School District held a first election to create the district on January 15, 1977. *See* p. A-4. The District had been organized pursuant to an order of the Harris County Board of Education in 1972, which was affirmed by the State Board of Education. The organizers wished to carve out a new and substantially white school district from the territory of the Houston Independent School District. Following these state actions, however, the United States District Court for the Southern District of Texas enjoined any further steps toward creation of the new district for at least three years. *See Westheimer Independent School District* v. *Brockette*, 567 S.W.2d 780 (Tex. 1978).[4] The 1977 election was the final step to form the district under state law, which required the citizens of the new district to elect a permanent board and to vote to assume part of the bonded indebtedness of the Houston district. TEX. EDUC. CODE ANN.

---

[4] The history of the Westheimer controversy is contained in the following: *Ross* v. *Houston Independent School District*, 559 F.2d 937 (5th Cir. 1977); *Ross* v. *Houston Independent School District*, 457 F. Supp. 18 (S.D. Tex. 1977); *Ross* v. *United States*, 583 F.2d 712 (5th Cir. 1978); *Ross* v. *Houston Independent School District*, 81 F.R.D. 532 (S.D. Tex. 1979).

§ 19.263(h), (j). Both the Texas and federal courts have held, however, that the interim board constitutes an official body of the State of Texas. *See* p. C-2,# 3, *infra; Westheimer Independent School District* v. *Brockette,* 567 S.W. 2d 780 (Tex. 1978).

In December, 1976, the Westheimer organizers had sought preclearance for their election under the Voting Rights Act of 1965 from the Attorney General of the United States. When preclearance was denied on January 13, 1977, the chairman of the interim board announced that the board would ignore the attorney general's opinion and hold its election. The Department of Justice declined to file suit to enjoin the election, so the Coalition, which had been formed to oppose splitting the Houston school district, filed suit on January 14, requesting a three-judge court and an injunction against the election. The district court refused both requests, and the election of a so-called "permanent board" was held on January 15. *See* p. A-1, *infra.*

On January 20, 1977, the United States filed its own suit to dissolve the permanent board and order the interim board to comply with the Voting Rights Act. After a number of collateral proceedings *(see Ross* v. *Houston Independent School District,* 559 F.2d 937 (5th Cir. 1977)) the two cases were consolidated with a statewide voting rights case in the Northern District of Texas (*Hereford Independent School District* v. *Bell,* 454 F.Supp. 143 (N.D. Tex. 1978) (3-judge Court)). When this Court decided that political subdivisions of a state are subject to the Voting Rights Act in *United States* v. *Sheffield Board of Commissioners,* 435 U.S. 110 (1978), the three-judge court in the Northern District entered judgment in the consolidated case and severed the Coalition case for further proceedings in the Southern District. *See* p. B-5, *infra.*

The Coalition and the United States filed motions for judgment. The Coalition also filed a motion for an award of attorneys' fees and supporting papers. After a pretrial conference, another three-judge court was convened in January, 1980. Following a hearing on May 2, 1980, the three-judge court entered a judgment setting aside the 1977 election and dissolving the elected Westheimer board. *See* pp. C-2-3. The lower court then awarded the Coalition attorneys' fees of $44,484.21 after finding that "[t]he Plaintiff has been ably served by its attorneys who skillfully met the substantive and procedural challenges presented in this case." *See* p. A-14, *infra.*

The relief awarded the Coalition by the Court had the effect of destroying the Westheimer school district's sources of public funds and making the award uncollectible. *See Ross* v. *Houston Independent School District,* 81 F.R.D. 532, 535-36 (S.D. Tex. 1979) (attorneys' fees). The Coalition had moved the court to make any attorneys' fee award payable by both the Westheimer district and the state and its agencies that had created the interim board, since Westheimer would have no funds available to satisfy the award if the plaintiffs prevailed. The Coalition urged the lower court to provide for payment by the state and its supervisory bodies based on the intent of Congress when it passed the Voting Rights Act Amendments of 1975.

The Coalition had also moved the Court to enter an appropriate incentive award to compensate counsel for the uncertain outcome of both the case and the recovery. Citing "multiplier awards" of $250 to $500 an hour in antitrust and securities cases, the Coalition suggested a proper incentive award would be $72,883.96.[5]

---

[5] An hourly fee of $47,457.50, an incentive award of $23,728.75, and disbursements of $1,697.71.

The lower court denied both these requests. Instead, it computed a fee based strictly on time spent and substantially discounted the hours worked by counsel if they were spent on informal communications or non-legal work. The final award was $44,484.21. *See* p. C-3, *infra.*

The lower court also refused to order any solvent state or local agency to pay the fee award. The court held:

> By analogy to cases wherein courts have interpreted identical language in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 . . ., a portion of the Senate Report accompanying the 1975 amendments to Section 14(e) apparently would support a finding that the State and the TEA can be held liable for attorney's fees assessed against WISD, if WISD is closely enough identified with and thoroughly controlled by the State. After thorough analysis of Texas case law, the Court is not persuaded that said relationship exists between WISD and the State [footnotes omitted].

See pp. A-7-8, *infra.*

The court distinguished this Court's award of attorney's fees against the State of Arkansas under a companion statute in *Hutto* v. *Finney,* 437 U.S. 678, 692. The court held:

> In the *Hutto* case the defendant state prison officials were represented by the State Attorney General's office from the inception of the litigation . . . The State's lawyers have not represented the instant defendant during any stage of this action.

See n. 9, p. A-7 *infra.*

From this judgment denying attorneys' fees in part, the Coalition has appealed.

SUMMARY OF ARGUMENT

A three-judge district court in this case granted the plaintiffs relief by dissolving the elected board of a splinter school district and thus blocking its formation. The court then ordered that the plaintiffs collect attorneys' fees from the abortive district. This holding ignores the clear mandate of Congress that the states pay fee awards in Voting Rights litigation. The lower court reached its conclusion on the basis of Texas law rather than the Voting Rights Act. The decision cannot be reconciled with this Court's holding in *Hutto* v. *Finney*, 437 U.S. 678 (1978), interpreting the same language in the legislative history of a sister statute, that "the Act itself could not be broader." *Id.* at 694. For this reason, the judgment below should be modified or reversed.

The award itself should be reconsidered because it bears no relation to a comparable fee in complex private litigation. For the Congressional standard the lower court substituted its own idea of reasonableness. The lower court awarded a fee based solely on lawyers' time, and discounted some of that time to rates as low as $20.00 an hour. Congress intended that the contingent nature of the case be considered, which the lower court failed to do. Thus the fee award is inadequate.

THE QUESTIONS ARE SUBSTANTIAL

I. CONGRESS INTENDED BOTH THE STATES AND THEIR LOCAL AGENCIES TO HAVE ULTIMATE LIABILITY FOR ALL ATTORNEYS' FEES AWARDS UNDER THE VOTING RIGHTS ACT AGAINST LOCAL OFFICIALS.

This case presents the remarkable result of a three-judge court first dissolving a school board and then awarding attorneys' fees payable only by the district thus aborted.

This Court should review the case because it represents a clear frustration of the purpose of Congress in providing for fee awards under the 1975 amendments to the Voting Rights Act and will lead to evasion of the act. If this opinion stands, many private citizens will be deprived of the ability to hire counsel to enforce the Act whenever a state chooses to create a new political entity. *Cf. Gomillion* v. *Lightfoot,* 346 U.S. 339, 345 (1960). That is because a successful challenge to new political entities would deny private plaintiffs the recovery of attorneys' fees.

By voiding a first election under state school law, a three-judge court in the Southern District of Texas has dissolved a splinter white school district that seeks to secede from the Houston Independent School District.[6] Only by satisfying the requirements of the Voting Rights Act in the United States District Court for the District of Columbia will Westheimer ever operate. Thus the Coalition is clearly the prevailing party in this litigation. Yet by holding that only the Westheimer school district was liable to pay a fee award, the lower court denied not only counsel but also the citizens who opposed Westheimer any recovery of their attorneys' fees and costs. *See* App. E, *infra.*

The same district court had already concluded that attorney's fees are uncollectible from Westheimer. *Ross* v. *Houston Independent School District,* 81 F.R.D. at 535-36. So the only way the award can be enforced is for the plaintiffs to abandon their opposition to Westheimer's formation and then seek to enforce the fee award against future tax collections. That is clearly not how Congress intended for private citizens to enforce the Voting Rights Act.

---

[6] "WISD, if permitted to operate, would be 89.6% white." *Ross* v. *United States,* 583 F.2d 712, 715 (5th Cir. 1978).

Congress specifically instructed the lower courts to enter fee awards against the states themselves whether the states were named in Voting Rights litigation or not.

The Senate report on the bill that became Section 14(e) stated:

> In several hearings held over a period of years, the Committee has found that fee awards are essential if the Constitutional requirements and Federal statutes to which sections 402 and 403 apply are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. Fee awards are therefore provided in cases covered by sections 402 and 403 in accordance with Congress' powers under, *inter alia,* the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are frequently state or local bodies or state or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either from the official directly, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-295, p. 41 (1975). In interpreting virtually identical language in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, this Court has stated that "the Act itself could not be broader." *Hutto* v. *Finney,* 437 U.S. at 694.

The lower court's judgment has greatly narrowed the Act. Only an award of attorney's fees against the state and county agencies in this case will uphold Congressional policy. As the Senate report stated:

> [F]ee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate these important Congressional policies.

> Courts have been instructed, since the passage of our first civil rights laws, to use the broadest and most effective remedies available to achieve the goals of these laws, and these remedies have included awards of attorney's fees as costs.

S. Rep. No. 94-295, p. 42.

The lower court's judgment creates a substantial precedent for other federal courts to read the Act wrongly. We are aware of no case in which a federal court has declined to award attorney's fees against the state in circumstances like these. Moreover, the lower court's judgment was based almost entirely on its analysis of state law, not federal law. Thus it reasoned that "independent school districts are creatures of the state" but are not closely enough identified with the state or "thoroughly controlled by the state" to render the state liable for fee awards. *See* p. A-7 *infra*.

But Texas law cannot determine the scope of a statute of the United States. The question is not what the Texas legislature intended but what the Congress intended. And the lower court's theory has no support at all in the legislative history of the Voting Rights Act. In fact, this Court has interpreted a companion statute to apply when judgment is recovered against any "individual officer" of a state. *Hutto* v. *Finney*, 437 U.S. at 693-94, 700.

It is impossible to believe that the interim officials of the Westheimer district are not officers of the State of Texas for purposes of this statute. It might be argued that the legislative history refers to "State *or* local government[s]," *Hutto* v. *Finney*, 437 U.S. at 694 (emphasis supplied). That is certainly the thrust of the lower court's reasoning. Of course, the Harris County board is itself a local body. Tex. Educ. Code Ann. §§ 17.01, 17.02, 17.21. But we urge this Court not to affirm a lower court decision dividing "local"

school districts from the state that creates, supports, and supervises them. That was not the thrust of *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978). The possibilities for abuse and evasion of this unpopular statute by the states are too great. Instead, this Court should restore the full sweep of the statute by overruling the opinion below. The defendant members of the interim board held office under a state statute and by the grace of the Harris County Board and the State Board of Education. *See Westheimer Independent School District* v. *Brockette*, 567 S.W.2d at 782; TEX. EDUC. CODE ANN. § 19.263(h). There is no independent Westheimer School District because it has not fulfilled the requirements of the Texas Education Code for creation of a school district. It has no board, no students, no staff, and no territory. The Houston Independent School District operates the schools in the area Westheimer claims. The lower court's distinction of state and local government rests on nothing but an empty formalism with no support in the statute or legislative history.

Thus the record contains plain error and the case need not even be set on the Court's calendar for oral argument. This Court should reverse the judgment with instructions to modify the decree to satisfy any fee award from state funds. The lower court has simply misread the statute.

II. THE THREE-JUDGE COURT ABUSED ITS DISCRETION IN SETTING A FEE AWARD BASED STRICTLY ON TIME SPENT BECAUSE CONGRESS INTENDED THAT FEES UNDER THE VOTING RIGHTS ACT BE AWARDED ON THE SAME BASIS AS IN COMPLEX PRIVATE LITIGATION AND TAKE INTO ACCOUNT THE ELEMENT OF CONTINGENCY.

For this Court to consider the standards for awarding attorney's fees under the Voting Rights Act would require full consideration. Yet this case merits such consideration. In setting a fee, the lower court ignored the intent of Congress and thus abused its discretion.

In reaching its award, the three-judge court ignored Congress's express intent that the Federal courts award fees under the Voting Rights Act in the same manner as fees are awarded in complex private litigation. The Senate report stated:

> It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, and not be reduced because the rights involved may be nonpecuniary in nature.

S. Rep. 94-295 at 42.

The drafters then expressly cited *Stanford Daily* v. *Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974). That situation was exactly the same as the situation here, and the court there stated:

> Federal courts' failure to make contingency calculations in determining fees awards . . . would discourage many attorneys from accepting pro bono publico cases by presenting them with the financially unacceptable "risk of wasting hours of work, overhead and expenses"

> over a course of successful and unsuccessful civil actions.

64 F.R.D. at 685.

Not only did the three-judge court award an uncollectible fee, the court also discounted the fee substantially because of its public-interest nature. It is simply impossible to believe that the same judges, sitting in a complex antitrust class-action case with a partial contingent fee, would have awarded counsel a fee based on hourly rates discounted by whether work was "on the merits," "informal communications," or "non-legal work." *See* p. A-16, *infra*. The lower court cited other "fee awards in similar cases" but confined itself to civil rights and school district litigation. *See* pp. A-15-16, *infra*. The instant opinion commits the exact error that the *Zurcher* Court warned against.

It is obvious that the fee was reduced because voting rights are non-pecuniary. The lower court merely chose to grant a modest recovery in a public-interest case. The lower court was asked to award counsel an incentive fee based on success and contingency. To fail even to consider the risk of litigation ignores Congressional intent and hobbles private citizens who wish to enforce the statute.

Congress instructed the judiciary to grant the same fees that private litigation commands. This is not such a fee. This decision frustrates the policy of Congress because competent private counsel will not accept employment in Voting Rights cases only to be compensated on the basis the lower court devised in this case. This award should be set aside as an abuse of discretion and an adequate award entered.

CONCLUSION

For the reasons stated, we urge this Court to review and reverse the decision of the three-judge court and direct entry of a proper fee award under the Voting Rights Act.

Respectfully submitted,

WILLIAM PANNILL
PANNILL AND HOOPER
1100 Milam Building,
Houston, Texas 77002
(713) 659-8090

Attorneys for Appellants

Of Counsel:
GARY CATRON

APPENDIX A

United States District Court

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, *Plaintiff*, vs. INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant*,	CIVIL ACTION NO. H-77-92
and	
UNITED STATES OF AMERICA, *Plaintiff*, vs. WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant*.	CIVIL ACTION NO. H-77-121

MEMORANDUM AND ORDER

The Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1971 *et seq.*, ("the Act"), Section 5, prohibits a state or political subdivision from enacting or seeking to administer any voting qualification, prerequisite, standard, practice, or procedure different from that in effect on November 1, 1972 without first either instituting a declaratory judgment action in the United States District Court for the District of Columbia or obtaining approval from the Attorney General. 42 U.S.C. § 1973c. The voting change must not have the purpose or effect of denying or abridging the right

to vote on account of race, color, or membership in a language minority. *Id.*

The Interim Board of Trustees of the Westheimer Independent School District ("WISD") requested the Attorney General to preclear a WISD special election scheduled for January 15, 1977. On January 13, 1977 the Attorney General interposed an objection under the Act to the proposed election.

The Coalition to Preserve Houston and the Houston Independent School District ("the Coalition") filed suit on January 14, 1977 seeking declaratory and injunctive relief against the Interim Board of WISD. Judge Hannay denied the Coalition's request to convene a three-judge court and refused to issue a temporary restraining order. The election was held on January 15 and the WISD Board of Trustees was elected.

The United States of America filed suit on January 20, 1977 alleging that the WISD Board violated Section 5 of the Act, 42 U.S.C. § 1973c, and seeking declaratory and injunctive relief.

The Coalition appealed from Judge Hannay's order denying it relief, then sought dismissal of the appeal in order to renew its request for a three-judge court pursuant to 28 U.S.C. § 2284(a). The Coalition also sought consolidation of its case with the government's case. The Fifth Circuit dismissed the appeal without prejudice to the Coalition's right to request from the lower court the convening of a three-judge court. On July 1, 1977 Judge Hannay's order denying a three-judge court was vacated, the cases were consolidated, and Judge Noel requested a three-judge court.

On July 29, 1977 Chief Judge Brown consolidated the Westheimer cases with a series of pending cases in the

Northern District of Texas in which the common issue was whether local school districts and municipalities in Texas are political subdivisions subject to Section 5 of the Act.

The three-judge court in the Northern District of Texas ruled in accordance with the decision in a related Supreme Court case, *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978) and found that municipalities and school districts in Texas are "political subdivisions" as that term is defined in Section 14(c)(2) of the Act, 42 U.S.C. § 1973*l*(c)(2), and are therefore subject to the provisions of Section 5 of the Act.[1] *Hereford Independent School District* v. *Bell*, 454 F. Supp. 143, 144 (N.D. Tex. 1978). The court further held in its Memorandum and Order entered on June 2, 1978 that the school districts involved should be permanently enjoined from conducting elections

[1] The *Sheffield* Court held that § 5 of the Act applies to the City of Sheffield, concluding that § 5 of the Act "covers all political units within designated jurisdictions . . .," United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 135 (1978), and that Congress did not intend the substantive scope of § 5 to be limited by the definition in § 14(c)(2). *Id.* at 126. Concerning § 14(c)(2), the Court observed that the definition of "political subdivision" in that section "was intended to operate only for purposes of determining which political units in nondesignated States may be separately designated for coverage under § 4(b)." *Id.* at 129 (footnote omitted). The Court further commented that "once an area of a non-designated State has been determined to be covered, all state actors within designated political subdivisions are subject to § 4(a)." *Id.* The State of Texas has been designated as a state covered by § 4(b) of the Act. 40 Fed. Reg. 43746 (September 23, 1975); *see also* Hereford Independent School Dist. v. Bell, 454 F. Supp. 143, 144 (N.D. Tex. 1978). Thus, this Court finds unnecessary any ruling that school districts in Texas are within the definition of "political subdivision" as that term is defined in § 14(c)(2) of the Act. This Court agrees with the Northern District of Texas Court that school districts in Texas are covered by § 5 of the Act, not because school districts come within the definition of "political subdivision" found in § 14(c)(2), but for the reason that Texas school districts are political units within a designated state. *See* United States v. Sheffield Bd. of Comm'rs, *supra*.

under changed voting procedures until and unless these entities comply with Section 5 of the Act. *Id.* at 145.

By an order dated September 12, 1978 the three-judge court severed the Westheimer cases from those in the Northern District of Texas and remanded them to the Southern District for judgment to be entered in accordance with the decision in the consolidated case. Both of the Plaintiffs have filed Motions for Entry of Judgment and the Coalition has filed a Motion for Award of Attorneys' Fees.

The Plaintiffs point out that in the Memorandum and Order issued on June 2, 1978 the three-judge court held that school districts should be permanently enjoined from conducting elections under changed procedures until and unless Section 5 of the Act is complied with. The Plaintiffs request that the election held by WISD on January 15, 1977 be set aside and declared null and void for failure to comply with the preclearance requirements of the Act.

A request to have county elections set aside was declined by the Supreme Court of the United States in *Allen* v. *Board of Elections,* 393 U.S. 544, 571-72 (1969), because Section 5 coverage was then an issue of first impression, the state enactments were not so clearly subject to the Section that a failure to submit them for approval constituted deliberate defiance of the Act, and the discriminatory purpose or effect of the statutes had not yet been determined by any court.[2] At the time of the election which is the sub-

[2] One way of viewing the language in *Allen* which defined the Court's reasons for not nullifying the election is that the *Allen* Court assumed the substantive determination of discriminatory purpose or effect must be made by a court. Allen v. Board of Elections, 393 U.S. 544, 571-72 (1969). Subsequently, however, in the context of distinguishing "coverage" and "substantive" functions of the courts, the Supreme Court stated that Congress expressly had reserved consideration of the substantive determination to either the District Court for the District of Columbia

ject of the present controversy, the Defendant apparently acknowledged the Section 5 coverage of the changed election procedures. This was evidenced by the Defendant's request to the Attorney General in a letter received on December 17, 1976, that he preclear the January 15, 1977 election (Stipulation ¶ 14). The discriminatory purpose or effect of the proposed voting changes accompanying the January 15 election was determined by the Attorney General, and he interposed an objection to the special election in a letter dated January 13, 1977 (Stipulation ¶ 15). The holding of the election by the Defendant despite the Attorney General's refusal to approve it was in deliberate defiance of the Act. Thus the instant case is readily distinguished from the circumstances of *Allen.*

The Supreme Court decided a Voting Rights Act case in 1971 in which the appellants sought to have certain elections set aside. *Perkins* v. *Matthews,* 400 U.S. 379 (1971). The determination of an appropriate remedy was left for the District Court.[3] The Supreme Court, however, observed that some considerations in the determination might include the nature of the election-procedure changes complained of

---

or the Attorney General of the United States. *See* Perkins v. Mathews, 400 U.S. 379, 385 (1971). *But see* Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 768 (N.D. Miss. 1978), wherein the Court distinguished between the statutorily defined functions of the Attorney General and the District Court for the District of Columbia: "[the Attorney General] interposed an objection [to the state statute]; and no defendant . . . has instituted an action in the . . . District Court for the District of Columbia seeking a declaratory judgment that the changes . . . do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* at 768.

[3] *See* Sumter County Democratic Executive Comm. v. Dearman, 514 F.2d 1168, 1170 (5th Cir. 1975) (the Fifth Circuit Court of Appeals did not void the election and followed the Supreme Court's lead in *Perkins,* leaving the question of the appropriate remedy to the three-judge court).

and whether it was reasonably clear at the time of the election that the changes were covered by Section 5. The Court further suggested that officials should be given an opportunity to seek approval of the changes and that a new election should be required only if they refuse to do so or if approval is not forthcoming. *Id.* at 396-97.

In 1978 the Supreme Court implemented the relief suggested in *Perkins:* affording local officials the opportunity to apply for federal approval of a voting change under Section 5 instead of ordering a new election. *Berry* v. *Doles,* 438 U.S. 190, 193 (1978) (per curiam). Such remedy is clearly inapplicable to the present Defendant since it did attempt to have the voting change approved by the Attorney General before the election took place.

The fact that federal authorization of the election was denied rendered the holding of the election unlawful[4] and its legally unenforceable results shall be set aside. Pre-election relief having been sought by the Coalition and improperly refused, the election now will be set aside. *See Hamer* v. *Campbell,* 358 F.2d 215, 222 (5th Cir.), *cert. denied,* 385 U.S. 851 (1966).

Section 14(e) of the Act gives the court discretion to award the prevailing party, other than the United States, reasonable attorneys' fees as part of the costs. 42 U.S.C. § 1973*l*(e). The legislative history of the 1975 amendments

---

[4] *See* Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 768 (N.D. Miss. 1978), wherein a state statute which changed voting procedures was submitted to the Attorney General, an objection was interposed, and the statute was declared by the court to be without legal force or effect; United States v. County Comm'n, Hale County, Ala., 425 F. Supp. 433, 436 (S.D. Ala. 1976), *aff'd,* 430 U.S. 924 (1977), wherein the Assistant Attorney General interposed an objection to Hale County's change in the method of electing County Commissioners, the court declared certain enactments with respect thereto to be of no force or effect, and any elections conducted pursuant to the acts were found unlawful.

to the Act characterizes the fee awards as essential to the full enforcement of the applicable constitutional requirements and federal statutes. S. Rep. No. 94-295, 94th Cong., 1st Sess. 41, *reprinted in* [1975] U.S. Code Cong. & Ad. News 774, 808.

The standards for awarding fees under Section 14(e) are the same as under the fee provisions of the 1964 Civil Rights Act. *Id.* at 807. A successful party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). The Coalition obviously meets the "prevailing party" requirements for attorneys' fees purposes. It has succeeded on the significant issues in litigation,[5] *i.e.,* whether school districts in Texas are political subdivisions under the Act and are subject to the Section 5 preclearance provisions, and has achieved the benefits sought in bringing suit.[6]

The fee award is not recoverable against the State of Texas or the Texas Education Agency ("TEA"), however. The Coalition contends that the State of Texas and the TEA are liable because school districts are agencies of the State and pursuant to statutorily authorized procedures, the State and the TEA became responsible for creating the

---

[5] Panior v. Iberville Parish School Bd. 543 F.2d 1117, 1119 (5th Cir. 1976) (quoting the legislative history of 42 U.S.C. § 19731(e) at [1975] U.S. Code Cong. & Ad. News 774, 808); Guajardo v. Estelle, 432 F. Supp. 1373, 1387 (S.D. Tex. 1977), *aff'd in part, rev'd in part on other grounds,* 580 F.2d 748 (5th Cir. 1978).

[6] The Coalition made four requests in its First Amended Complaint filed on July 13, 1977: the convening of a three-judge court, declaratory relief regarding the validity of the January 15, 1977 election, injunctive relief against any official action of the Defendant Board of Trustees, and the award of reasonable attorneys' fees and costs of suit. The decision of the three-judge court in the *Hereford* case and the present findings and Final Judgment of this Court evidence the favorable outcome of the litigation with respect to the Coalition's objectives in bringing suit.

WISD. By analogy to cases wherein courts have interpreted identical language in the legislative history[7] of the Civil Rights Attorney's Fees Awards Act of 1976, *amending* 42 U.S.C. § 1988, a portion of the Senate Report accompanying the 1975 amendments to Section 14(e)[8] apparently would support a finding that the State and the TEA can be held liable for attorneys' fees assessed against WISD,[9] if WISD is closely identified enough with and thoroughly controlled by the State. After thorough analysis of Texas

---

[7] S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913.

[8] [D]efendants in these cases are frequently state or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either from the official directly, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-295, 94th Cong., 1st Sess. 41, *reprinted in* [1975] U.S. Code Cong. & Ad. News 774, 808.

[9] In the civil rights context, the Supreme Court of the United States has held that the Eleventh Amendment does not bar an award of attorneys' fees against state officials in their official capacities. Hutto v. Finney, 437 U.S. 678, 692 (1978). In response to an objection to the district court's having directed that the fees be paid out of Department of Correction funds, the Hutto Court observed that other directives "comparable in their actual impact on the State" had been approved, and the directive was found not to be reversible error even though omission of any reference to the Department would have been better form. *Id.* at 692-93. In the *Hutto* case the defendant state prison officials were represented by the State Attorney General's office from the inception of the litigation. *Id.* at 689, 692 n.19, 693, 699, 699 n.32. The State's lawyers have not represented the instant defendant during any stage of this action.

The Fifth Circuit Court of Appeals also has held that the Eleventh Amendment is not a bar to an award of attorneys' fees against a state, *i.e.*, against state officials in their official capacities, in actions under the statutes enumerated in the Civil Rights Attorney's Fees Awards Act. *See* e.g., Rainey v. Jackson State College, 591 F.2d 1002, 1003 (5th Cir. 1979); Morrow v. Dillard, 580 F.2d 1284, 1298 (5th Cir. 1978); Rainey v. Jackson State College, 551 F.2d 672, 675 (5th Cir. 1977).

case law, the Court is not persuaded that said relationship exists between WISD and the State. *Cf. Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274, 280 (1977) (in determining whether Eleventh Amendment immunity extended to Board of Education, the Court found that the determination rested, in part, on the status of the entity pursuant to state law). The validity of WISD as a legal entity created pursuant to state law is not subject to challenge. *See Westheimer Independent School District* v. *Brockette,* 567 S.W. 2d 780, 789 (Tex. 1978). The Fifth Circuit Court of Appeals acknowledged WISD's status as a validly created school district and vacated that portion of the district court's order enjoining WISD from maintaining its corporate existence. *Ross* v. *Houston Independent School District,* 583 F.2d 712, 716 (5th Cir. 1978). Accordingly, WISD may be viewed by this Court as being subject to the various rulings concerning independent school districts which have been rendered by Texas state and federal courts.

Texas law is clear that school districts in the State are "local public corporations of the same general character as municipal corporations." *Love* v. *City of Dallas,* 40 S.W.2d 20, 26 (Tex. 1931) (citation omitted); *accord, Lewis* v. *Independent School District of City of Austin,* 161 S.W.2d 450 (Tex. 1942); *Watts* v. *Double Oak Independent School District,* 377 S.W.2d 779 (Tex. Civ. App. — Ft. Worth 1964, no writ). By virtue of that status, for example, school districts and their trustees have been cloaked with immunity from negligence in tort actions while they are exercising governmental functions. *See, e.g., Campbell* v. *Jones,* 264 S.W.2d 425 (Tex. 1954); *Russell* v. *Edgewood Independent School District,* 406 S.W.2d 249 (Tex. Civ. App. — San Antonio 1966, writ ref'd n.r.e.); *Treadaway* v. *Whitney Independent School District,* 205 S.W.2d 97 (Tex. Civ. App. — Waco 1947, no writ). Further, as political sub-

between district and State or the thorough control by State over district that would justify holding the State or its agent, the TEA, liable for attorneys' fees awarded against WISD.[10] In the Westheimer cases the local entity subject

---

[10] A discerning analysis of the separate identities of the State of Texas and its school districts can be found in Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 100 S.Ct. 52 (1979). The Court notes that said analysis was in the context of the Fifth Circuit's ascertaining an independent school district's standing to sue the State of Texas; nevertheless, the Court finds the reasoning of the Fifth Circuit extremely helpful in the context of the instant decision. The Fifth Circuit observed that school districts and the State may represent different constituencies: "The school board and the state represent different political interests with different degrees of influence; a group can be a statewide minority, for example, but a majority in certain localities." *Id.* at 1062. In determining that the Garland Independent School District was sufficiently independent of the State to ensure the adversariness required by Article III of the Constitution, the *Rogers* court outlined in some detail the relationship between school districts and the State:

> Legally, independent school districts in Texas have a variety of powers. They perform "all educational functions not specifically delegated" to the state education agencies. Tex. Educ. Code Ann., tit. 2, § 11.01. They are specifically empowered to make contracts, *id.*, §§ 23.26, 23.28, to levy and collect taxes, *id.* § 23.27, to obtain property by eminent domain, *id.* § 23.31, and generally "to manage and govern the public free schools of the district," *id.* § 23.26(b). They can sue and be sued. *Id.*, § 23.26(a).
>
> The state can, to be sure, supervise the local boards to some degree. The state education authorities may review local school boards' decisions, Tex. Educ. Code Ann., tit. 2, § 11.13, and the local boards are bound by regulations issued by the state agency, *Bear* v. *Donna Ind. School Dist.*, 85 S.W.2d 797, 798 (Tex. Civ. App. 1935). But local boards are then free to attack the state agency's decisions in court. *See e.g., Board of Trustees* v. *Briggs*, 486 S.W.2d 829 (Tex. Civ. App. 1972). Thus it seems clear that local boards have some significant legal rights that the state agency cannot take away.
>
> As a practical matter, too, local school boards seem likely to enjoy a good deal of freedom from state authorities. The members of the local boards are elected by the people of the district, not appointed from above. Tex. Educ. Code Ann., tit. 2, § 23.10(b). Moreover, the local boards have their own funds.

school districts from the state that creates, supports, and supervises them. That was not the thrust of *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978). The possibilities for abuse and evasion of this unpopular statute by the states are too great. Instead, this Court should restore the full sweep of the statute by overruling the opinion below. The defendant members of the interim board held office under a state statute and by the grace of the Harris County Board and the State Board of Education. *See Westheimer Independent School District* v. *Brockette*, 567 S.W.2d at 782; TEX. EDUC. CODE ANN. § 19.263(h). There is no independent Westheimer School District because it has not fulfilled the requirements of the Texas Education Code for creation of a school district. It has no board, no students, no staff, and no territory. The Houston Independent School District operates the schools in the area Westheimer claims. The lower court's distinction of state and local government rests on nothing but an empty formalism with no support in the statute or legislative history.

Thus the record contains plain error and the case need not even be set on the Court's calendar for oral argument. This Court should reverse the judgment with instructions to modify the decree to satisfy any fee award from state funds. The lower court has simply misread the statute.

II. THE THREE-JUDGE COURT ABUSED ITS DISCRETION IN SETTING A FEE AWARD BASED STRICTLY ON TIME SPENT BECAUSE CONGRESS INTENDED THAT FEES UNDER THE VOTING RIGHTS ACT BE AWARDED ON THE SAME BASIS AS IN COMPLEX PRIVATE LITIGATION AND TAKE INTO ACCOUNT THE ELEMENT OF CONTINGENCY.

For this Court to consider the standards for awarding attorney's fees under the Voting Rights Act would require full consideration. Yet this case merits such consideration. In setting a fee, the lower court ignored the intent of Congress and thus abused its discretion.

In reaching its award, the three-judge court ignored Congress's express intent that the Federal courts award fees under the Voting Rights Act in the same manner as fees are awarded in complex private litigation. The Senate report stated:

> It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, and not be reduced because the rights involved may be nonpecuniary in nature.

S. Rep. 94-295 at 42.

The drafters then expressly cited *Stanford Daily* v. *Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974). That situation was exactly the same as the situation here, and the court there stated:

> Federal courts' failure to make contingency calculations in determining fees awards . . . would discourage many attorneys from accepting pro bono publico cases by presenting them with the financially unacceptable "risk of wasting hours of work, overhead and expenses"

> over a course of successful and unsuccessful civil actions.

64 F.R.D. at 685.

Not only did the three-judge court award an uncollectible fee, the court also discounted the fee substantially because of its public-interest nature. It is simply impossible to believe that the same judges, sitting in a complex antitrust class-action case with a partial contingent fee, would have awarded counsel a fee based on hourly rates discounted by whether work was "on the merits," "informal communications," or "non-legal work." *See* p. A-16, *infra*. The lower court cited other "fee awards in similar cases" but confined itself to civil rights and school district litigation. *See* pp. A-15-16, *infra*. The instant opinion commits the exact error that the *Zurcher* Court warned against.

It is obvious that the fee was reduced because voting rights are non-pecuniary. The lower court merely chose to grant a modest recovery in a public-interest case. The lower court was asked to award counsel an incentive fee based on success and contingency. To fail even to consider the risk of litigation ignores Congressional intent and hobbles private citizens who wish to enforce the statute.

Congress instructed the judiciary to grant the same fees that private litigation commands. This is not such a fee. This decision frustrates the policy of Congress because competent private counsel will not accept employment in Voting Rights cases only to be compensated on the basis the lower court devised in this case. This award should be set aside as an abuse of discretion and an adequate award entered.

CONCLUSION

For the reasons stated, we urge this Court to review and reverse the decision of the three-judge court and direct entry of a proper fee award under the Voting Rights Act.

Respectfully submitted,

WILLIAM PANNILL
PANNILL AND HOOPER
1100 Milam Building,
Houston, Texas 77002
(713) 659-8090

Attorneys for Appellants

Of Counsel:
GARY CATRON

APPENDIX A

United States District Court

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT,
Plaintiff,

vs.

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant,

CIVIL ACTION NO. H-77-92

and

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WESTHEIMER INDEPENDENT SCHOOL DISTRICT,
Defendant.

CIVIL ACTION NO. H-77-121

MEMORANDUM AND ORDER

The Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1971 *et seq.*, ("the Act"), Section 5, prohibits a state or political subdivision from enacting or seeking to administer any voting qualification, prerequisite, standard, practice, or procedure different from that in effect on November 1, 1972 without first either instituting a declaratory judgment action in the United States District Court for the District of Columbia or obtaining approval from the Attorney General. 42 U.S.C. § 1973c. The voting change must not have the purpose or effect of denying or abridging the right

to vote on account of race, color, or membership in a language minority. *Id.*

The Interim Board of Trustees of the Westheimer Independent School District ("WISD") requested the Attorney General to preclear a WISD special election scheduled for January 15, 1977. On January 13, 1977 the Attorney General interposed an objection under the Act to the proposed election.

The Coalition to Preserve Houston and the Houston Independent School District ("the Coalition") filed suit on January 14, 1977 seeking declaratory and injunctive relief against the Interim Board of WISD. Judge Hannay denied the Coalition's request to convene a three-judge court and refused to issue a temporary restraining order. The election was held on January 15 and the WISD Board of Trustees was elected.

The United States of America filed suit on January 20, 1977 alleging that the WISD Board violated Section 5 of the Act, 42 U.S.C. § 1973c, and seeking declaratory and injunctive relief.

The Coalition appealed from Judge Hannay's order denying it relief, then sought dismissal of the appeal in order to renew its request for a three-judge court pursuant to 28 U.S.C. § 2284(a). The Coalition also sought consolidation of its case with the government's case. The Fifth Circuit dismissed the appeal without prejudice to the Coalition's right to request from the lower court the convening of a three-judge court. On July 1, 1977 Judge Hannay's order denying a three-judge court was vacated, the cases were consolidated, and Judge Noel requested a three-judge court.

On July 29, 1977 Chief Judge Brown consolidated the Westheimer cases with a series of pending cases in the

Northern District of Texas in which the common issue was whether local school districts and municipalities in Texas are political subdivisions subject to Section 5 of the Act.

The three-judge court in the Northern District of Texas ruled in accordance with the decision in a related Supreme Court case, *United States* v. *Sheffield Board of Commissioners,* 435 U.S. 110 (1978) and found that municipalities and school districts in Texas are "political subdivisions" as that term is defined in Section 14(c)(2) of the Act, 42 U.S.C. § 1973*l*(c)(2), and are therefore subject to the provisions of Section 5 of the Act.[1] *Hereford Independent School District* v. *Bell,* 454 F. Supp. 143, 144 (N.D. Tex. 1978). The court further held in its Memorandum and Order entered on June 2, 1978 that the school districts involved should be permanently enjoined from conducting elections

---

[1] The *Sheffield* Court held that § 5 of the Act applies to the City of Sheffield, concluding that § 5 of the Act "covers all political units within designated jurisdictions . . .," United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 135 (1978), and that Congress did not intend the substantive scope of § 5 to be limited by the definition in § 14(c)(2). *Id.* at 126. Concerning § 14(c)(2), the Court observed that the definition of "political subdivision" in that section "was intended to operate only for purposes of determining which political units in nondesignated States may be separately designated for coverage under § 4(b)." *Id.* at 129 (footnote omitted). The Court further commented that "once an area of a non-designated State has been determined to be covered, all state actors within designated political subdivisions are subject to § 4(a)." *Id.* The State of Texas has been designated as a state covered by § 4(b) of the Act. 40 Fed. Reg. 43746 (September 23, 1975); *see also* Hereford Independent School Dist. v. Bell, 454 F. Supp. 143, 144 (N.D. Tex. 1978). Thus, this Court finds unnecessary any ruling that school districts in Texas are within the definition of "political subdivision" as that term is defined in § 14(c)(2) of the Act. This Court agrees with the Northern District of Texas Court that school districts in Texas are covered by § 5 of the Act, not because school districts come within the definition of "political subdivision" found in § 14(c)(2), but for the reason that Texas school districts are political units within a designated state. *See* United States v. Sheffield Bd. of Comm'rs, *supra.*

under changed voting procedures until and unless these entities comply with Section 5 of the Act. *Id.* at 145.

By an order dated September 12, 1978 the three-judge court severed the Westheimer cases from those in the Northern District of Texas and remanded them to the Southern District for judgment to be entered in accordance with the decision in the consolidated case. Both of the Plaintiffs have filed Motions for Entry of Judgment and the Coalition has filed a Motion for Award of Attorneys' Fees.

The Plaintiffs point out that in the Memorandum and Order issued on June 2, 1978 the three-judge court held that school districts should be permanently enjoined from conducting elections under changed procedures until and unless Section 5 of the Act is complied with. The Plaintiffs request that the election held by WISD on January 15, 1977 be set aside and declared null and void for failure to comply with the preclearance requirements of the Act.

A request to have county elections set aside was declined by the Supreme Court of the United States in *Allen* v. *Board of Elections,* 393 U.S. 544, 571-72 (1969), because Section 5 coverage was then an issue of first impression, the state enactments were not so clearly subject to the Section that a failure to submit them for approval constituted deliberate defiance of the Act, and the discriminatory purpose or effect of the statutes had not yet been determined by any court.[2] At the time of the election which is the sub-

---

[2] One way of viewing the language in *Allen* which defined the Court's reasons for not nullifying the election is that the *Allen* Court assumed the substantive determination of discriminatory purpose or effect must be made by a court. Allen v. Board of Elections, 393 U.S. 544, 571-72 (1969). Subsequently, however, in the context of distinguishing "coverage" and "substantive" functions of the courts, the Supreme Court stated that Congress expressly had reserved consideration of the substantive determination to either the District Court for the District of Columbia

ject of the present controversy, the Defendant apparently acknowledged the Section 5 coverage of the changed election procedures. This was evidenced by the Defendant's request to the Attorney General in a letter received on December 17, 1976, that he preclear the January 15, 1977 election (Stipulation ¶ 14). The discriminatory purpose or effect of the proposed voting changes accompanying the January 15 election was determined by the Attorney General, and he interposed an objection to the special election in a letter dated January 13, 1977 (Stipulation ¶ 15). The holding of the election by the Defendant despite the Attorney General's refusal to approve it was in deliberate defiance of the Act. Thus the instant case is readily distinguished from the circumstances of *Allen.*

The Supreme Court decided a Voting Rights Act case in 1971 in which the appellants sought to have certain elections set aside. *Perkins* v. *Matthews,* 400 U.S. 379 (1971). The determination of an appropriate remedy was left for the District Court.[3] The Supreme Court, however, observed that some considerations in the determination might include the nature of the election-procedure changes complained of

---

or the Attorney General of the United States. *See* Perkins v. Mathews, 400 U.S. 379, 385 (1971). *But see* Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 768 (N.D. Miss. 1978), wherein the Court distinguished between the statutorily defined functions of the Attorney General and the District Court for the District of Columbia: "[the Attorney General] interposed an objection [to the state statute]; and no defendant ... has instituted an action in the ... District Court for the District of Columbia seeking a declaratory judgment that the changes ... do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* at 768.

[3] *See* Sumter County Democratic Executive Comm. v. Dearman, 514 F.2d 1168, 1170 (5th Cir. 1975) (the Fifth Circuit Court of Appeals did not void the election and followed the Supreme Court's lead in *Perkins,* leaving the question of the appropriate remedy to the three-judge court).

and whether it was reasonably clear at the time of the election that the changes were covered by Section 5. The Court further suggested that officials should be given an opportunity to seek approval of the changes and that a new election should be required only if they refuse to do so or if approval is not forthcoming. *Id.* at 396-97.

In 1978 the Supreme Court implemented the relief suggested in *Perkins:* affording local officials the opportunity to apply for federal approval of a voting change under Section 5 instead of ordering a new election. *Berry* v. *Doles,* 438 U.S. 190, 193 (1978) (per curiam). Such remedy is clearly inapplicable to the present Defendant since it did attempt to have the voting change approved by the Attorney General before the election took place.

The fact that federal authorization of the election was denied rendered the holding of the election unlawful[4] and its legally unenforceable results shall be set aside. Pre-election relief having been sought by the Coalition and improperly refused, the election now will be set aside. *See Hamer* v. *Campbell,* 358 F.2d 215, 222 (5th Cir.), *cert. denied,* 385 U.S. 851 (1966).

Section 14(e) of the Act gives the court discretion to award the prevailing party, other than the United States, reasonable attorneys' fees as part of the costs. 42 U.S.C. § 1973*l*(e). The legislative history of the 1975 amendments

---

[4] *See* Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 768 (N.D. Miss. 1978), wherein a state statute which changed voting procedures was submitted to the Attorney General, an objection was interposed, and the statute was declared by the court to be without legal force or effect; United States v. County Comm'n, Hale County, Ala., 425 F. Supp. 433, 436 (S.D. Ala. 1976), *aff'd,* 430 U.S. 924 (1977), wherein the Assistant Attorney General interposed an objection to Hale County's change in the method of electing County Commissioners, the court declared certain enactments with respect thereto to be of no force or effect, and any elections conducted pursuant to the acts were found unlawful.

to the Act characterizes the fee awards as essential to the full enforcement of the applicable constitutional requirements and federal statutes. S. Rep. No. 94-295, 94th Cong., 1st Sess. 41, *reprinted in* [1975] U.S. Code Cong. & Ad. News 774, 808.

The standards for awarding fees under Section 14(e) are the same as under the fee provisions of the 1964 Civil Rights Act. *Id.* at 807. A successful party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). The Coalition obviously meets the "prevailing party" requirements for attorneys' fees purposes. It has succeeded on the significant issues in litigation,[5] *i.e.*, whether school districts in Texas are political subdivisions under the Act and are subject to the Section 5 preclearance provisions, and has achieved the benefits sought in bringing suit.[6]

The fee award is not recoverable against the State of Texas or the Texas Education Agency ("TEA"), however. The Coalition contends that the State of Texas and the TEA are liable because school districts are agencies of the State and pursuant to statutorily authorized procedures, the State and the TEA became responsible for creating the

---

[5] Panior v. Iberville Parish School Bd. 543 F.2d 1117, 1119 (5th Cir. 1976) (quoting the legislative history of 42 U.S.C. § 19731(e) at [1975] U.S. Code Cong. & Ad. News 774, 808); Guajardo v. Estelle, 432 F. Supp. 1373, 1387 (S.D. Tex. 1977), *aff'd in part, rev'd in part on other grounds*, 580 F.2d 748 (5th Cir. 1978).

[6] The Coalition made four requests in its First Amended Complaint filed on July 13, 1977: the convening of a three-judge court, declaratory relief regarding the validity of the January 15, 1977 election, injunctive relief against any official action of the Defendant Board of Trustees, and the award of reasonable attorneys' fees and costs of suit. The decision of the three-judge court in the *Hereford* case and the present findings and Final Judgment of this Court evidence the favorable outcome of the litigation with respect to the Coalition's objectives in bringing suit.

WISD. By analogy to cases wherein courts have interpreted identical language in the legislative history[7] of the Civil Rights Attorney's Fees Awards Act of 1976, *amending* 42 U.S.C. § 1988, a portion of the Senate Report accompanying the 1975 amendments to Section 14(e)[8] apparently would support a finding that the State and the TEA can be held liable for attorneys' fees assessed against WISD,[9] if WISD is closely identified enough with and thoroughly controlled by the State. After thorough analysis of Texas

---

[7] S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913.

[8] [D]efendants in these cases are frequently state or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either from the official directly, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-295, 94th Cong., 1st Sess. 41, *reprinted in* [1975] U.S. Code Cong. & Ad. News 774, 808.

[9] In the civil rights context, the Supreme Court of the United States has held that the Eleventh Amendment does not bar an award of attorneys' fees against state officials in their official capacities. Hutto v. Finney, 437 U.S. 678, 692 (1978). In response to an objection to the district court's having directed that the fees be paid out of Department of Correction funds, the Hutto Court observed that other directives "comparable in their actual impact on the State" had been approved, and the directive was found not to be reversible error even though omission of any reference to the Department would have been better form. *Id.* at 692-93. In the *Hutto* case the defendant state prison officials were represented by the State Attorney General's office from the inception of the litigation. *Id.* at 689, 692 n.19, 693, 699, 699 n.32. The State's lawyers have not represented the instant defendant during any stage of this action.

The Fifth Circuit Court of Appeals also has held that the Eleventh Amendment is not a bar to an award of attorneys' fees against a state, *i.e.*, against state officials in their official capacities, in actions under the statutes enumerated in the Civil Rights Attorney's Fees Awards Act. *See* e.g., Rainey v. Jackson State College, 591 F.2d 1002, 1003 (5th Cir. 1979); Morrow v. Dillard, 580 F.2d 1284, 1298 (5th Cir. 1978); Rainey v. Jackson State College, 551 F.2d 672, 675 (5th Cir. 1977).

case law, the Court is not persuaded that said relationship exists between WISD and the State. *Cf. Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274, 280 (1977) (in determining whether Eleventh Amendment immunity extended to Board of Education, the Court found that the determination rested, in part, on the status of the entity pursuant to state law). The validity of WISD as a legal entity created pursuant to state law is not subject to challenge. *See Westheimer Independent School District* v. *Brockette,* 567 S.W. 2d 780, 789 (Tex. 1978). The Fifth Circuit Court of Appeals acknowledged WISD's status as a validly created school district and vacated that portion of the district court's order enjoining WISD from maintaining its corporate existence. *Ross* v. *Houston Independent School District,* 583 F.2d 712, 716 (5th Cir. 1978). Accordingly, WISD may be viewed by this Court as being subject to the various rulings concerning independent school districts which have been rendered by Texas state and federal courts.

Texas law is clear that school districts in the State are "local public corporations of the same general character as municipal corporations." *Love* v. *City of Dallas,* 40 S.W.2d 20, 26 (Tex. 1931) (citation omitted); *accord, Lewis* v. *Independent School District of City of Austin,* 161 S.W.2d 450 (Tex. 1942); *Watts* v. *Double Oak Independent School District,* 377 S.W.2d 779 (Tex. Civ. App. — Ft. Worth 1964, no writ). By virtue of that status, for example, school districts and their trustees have been cloaked with immunity from negligence in tort actions while they are exercising governmental functions. *See, e.g., Campbell* v. *Jones,* 264 S.W.2d 425 (Tex. 1954); *Russell* v. *Edgewood Independent School District,* 406 S.W.2d 249 (Tex. Civ. App. — San Antonio 1966, writ ref'd n.r.e.); *Treadaway* v. *Whitney Independent School District,* 205 S.W.2d 97 (Tex. Civ. App. — Waco 1947, no writ). Further, as political sub-

divisions of the State, school districts are exempt from execution or garnishment proceedings. *See National Surety Corporation* v. *Friendswood Independent School District,* 433 S.W.2d 690, 694 (Tex. 1968).

Although school districts in Texas are subject to direct statutory control by the State Legislature, the legislature may delegate and has delegated much of the control of the districts to the local trustees. *See, e.g., University Interscholastic League* v. *Midwestern University,* 255 S.W.2d 177 (Tex. 1953); *Alanreed Independent School District* v. *McLean Independent School District,* 354 S.W.2d 232 (Tex. Civ. App. — Amarillo 1962, writ ref'd n.r.e.); *Independent School District* v. *Central Education Agency,* 247 S.W.2d 597 (Tex. Civ. App. — Austin 1952), *aff'd,* 254 S.W.2d 357 (Tex. 1953). Moreover, "the tradition of local autonomy in education seems long and powerful in Texas," *Rogers* v. *Brockette,* 588 F.2d 1057, 1064 (5th Cir.), *cert. denied,* 100 S. Ct. 52 (1979), and because the State provides for such extensive local control, *see Port Arthur Independent School District* v. *City of Groves,* 376 S.W.2d 330, 333 (Tex. 1964), express limitations exist on the legislature's power to statutorily control school districts. *See, e.g., Port Arthur Independent School District* v. *City of Groves, supra; Love* v. *City of Dallas, supra.* The Texas Supreme Court specifically has declined to equate the identities of school districts and the State insofar as property is concerned: "Although our independent school districts are creatures of the state and receive substantial funds for their operation from the state, they are independent political entities and we will not classify their property as state property." *Port Arthur Independent School District* v. *City of Groves, supra,* at 333. Throughout the case law concerning the status of school districts in Texas, a marked pattern emerges: the same courts that characterize school districts as agencies of the State also decline to establish the close identity

between district and State or the thorough control by State over district that would justify holding the State or its agent, the TEA, liable for attorneys' fees awarded against WISD.[10] In the Westheimer cases the local entity subject

---

[10] A discerning analysis of the separate identities of the State of Texas and its school districts can be found in Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 100 S.Ct. 52 (1979). The Court notes that said analysis was in the context of the Fifth Circuit's ascertaining an independent school district's standing to sue the State of Texas; nevertheless, the Court finds the reasoning of the Fifth Circuit extremely helpful in the context of the instant decision. The Fifth Circuit observed that school districts and the State may represent different constituencies: "The school board and the state represent different political interests with different degrees of influence; a group can be a statewide minority, for example, but a majority in certain localities." *Id.* at 1062. In determining that the Garland Independent School District was sufficiently independent of the State to ensure the adversariness required by Article III of the Constitution, the *Rogers* court outlined in some detail the relationship between school districts and the State:

> Legally, independent school districts in Texas have a variety of powers. They perform "all educational functions not specifically delegated" to the state education agencies. Tex. Educ. Code Ann., tit. 2, § 11.01. They are specifically empowered to make contracts, *id.*, §§ 23.26, 23.28, to levy and collect taxes, *id.* § 23.27, to obtain property by eminent domain, *id.* § 23.31, and generally "to manage and govern the public free schools of the district," *id.* § 23.26(b). They can sue and be sued. *Id.*, § 23.26(a).
>
> The state can, to be sure, supervise the local boards to some degree. The state education authorities may review local school boards' decisions, Tex. Educ. Code Ann., tit. 2, § 11.13, and the local boards are bound by regulations issued by the state agency, *Bear* v. *Donna Ind. School Dist.*, 85 S.W.2d 797, 798 (Tex. Civ. App. 1935). But local boards are then free to attack the state agency's decisions in court. *See e.g., Board of Trustees* v. *Briggs*, 486 S.W.2d 829 (Tex. Civ. App. 1972). Thus it seems clear that local boards have some significant legal rights that the state agency cannot take away.
>
> As a practical matter, too, local school boards seem likely to enjoy a good deal of freedom from state authorities. The members of the local boards are elected by the people of the district, not appointed from above. Tex. Educ. Code Ann., tit. 2, § 23.10(b). Moreover, the local boards have their own funds.

to the Section 5 preclearance provisions is the party sued and the Coalition's award is collectible against the Defendant school district itself.

The Court of Appeals for the Fifth Circuit in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) set down twelve guidelines to be followed by district courts in awarding attorneys' fees. These standards apply in a Voting Rights Act case. *Fain* v. *Caddo Parish Police Jury*, 564 F.2d 707, 710 (5th Cir. 1977). The *Johnson* court further specified that any agreement which has been made as to fees is not controlling; the court assessing fees must determine what is reasonable, but in no event may the award be greater than what the litigant was contractually bound to pay. *Johnson* v. *Georgia Highway Express, Inc.*, *supra*, at 718. The court must determine the reasonableness of the fee pursuant to the following factors:

1. *The time and labor required.* The Plaintiff Coalition's attorneys have submitted a detailed record of the time spent on the case including the dates and nature of the work performed during the time in question. (Motion for Award of Attorneys' Fees, Exhibit B). A total of 632.5 hours was spent by attorneys for the Coalition and their paralegal assistants over a period of approximately three years.

They can levy and collect taxes, *id.* § 23.27, and funds disbursed by the state to the districts become the property of the local board of trustees, which holds them in trust for the district; they cannot be taken away by the state. *Wright* v. *Houston Ind. School Dist.*, 393 F. Supp. 1149, 1155 (S.D. Tex. 1975), *vacated and remanded on other grounds*, 569 F.2d 1383 (5th Cir. 1978); *Love* v. *City of Dallas*, 120 Tex. 351, 40 S.W.2d 20, 26 (1931).

Id. at 1065-66 (emphasis in original). Further, the court interpreted two Supreme Court decisions as suggesting that actions of school districts are not to be treated as direct acts of the state itself. *Id.* at 1066, citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Milliken v. Bradley, 418 U.S. 717 (1974).

(Motion for Award of Attorneys' Fees, Exhibit A). The Plaintiff's attorney has indicated that 105.25 of the total hours were spent by paralegals. The time spent by paralegals, computed at appropriate paralegal rates, reasonably can constitute part of the time considered in awarding attorneys' fees. *See, e.g., Dietrich Corp.* v. *King Resources Co.*, 596 F.2d 422 (10th Cir. 1979); *Todd Shipyards* v. *Director, Office of Workers' Compensation,* 545 F.2d 1176 (9th Cir. 1976); *cf. Northcross* v. *Board of Education of Memphis City Schools,* 611 F.2d 624, 637 (6th Cir. 1979) ("necessary services performed by attorneys which could reasonably have been performed by less expensive personnel may be compensated at a lower rate, ... [but] they should not be excluded altogether"); *Johnson* v. *Georgia Highway Express, Inc.,* supra, at 717 (non-legal work may be compensated at a rate lower than legal work regardless of whether the non-legal work is performed by an attorney or by paralegal personnel). Although an attorney's record of time is not a talisman, the *Johnson* case mandates that the hours claimed be given real consideration. *Rainey* v. *Jackson State College,* 551 F.2d 672, 677 (5th Cir. 1977). Considering the nature of the litigation, the expenditure of time and labor does not appear excessive; in any event the accuracy and adequacy of the affidavits are uncontroverted.

Where more than one attorney is involved in a case, the possibility of duplication of effort must be scrutinized. The record reflects some duplication of Miss Perkins' efforts by Mr. Catron, particularly with regard to his establishing familiarity with the case file and researching the attorneys' fees issue. A ten per cent (10%) downward adjustment in the fees of these attorneys takes these factors into account.

A differentiation of rates based upon the type of labor performed is also in order. *See Johnson* v. *Georgia Highway Express, Inc., supra,* at 717. The Court distinguishes three categories of the type of work performed: (1) strictly

legal activities, which include legal research, writing, and court appearances; (2) legally related activities, which include conferences, telephone calls, and other correspondence; and (3) routine administrative activities, which include travel time, clerical work, and compilation of facts and statistics. For purposes of the application of different rates to different types of work, the first category will be referred to as work on the merits of the case; the second category will be called informal communications; and the third category will be referred to as non-legal work.

2. *The novelty and difficulty of the questions.* This was a case of first impression which involved many diffiicult questions of law arising under 42 U.S.C. §§ 1971 *et seq.* In addition to the complicated substantive questions, many complex procedural issues had to be dealt with in the litigation.

3. *The skill requisite to perform the legal service properly.* The performance of the Plaintiff's attorneys can be evaluated primarily through the documents on file in the record of the case since relatively few court appearances were made during the protracted course of this litigation. A high degree of legal skill was required to deal with the complex issues in the case and the Coalition's attorneys have demonstrated commendable expertise through the extensive briefs and other work product before the Court.

4. *The preclusion of other employment by the attorney due to acceptance of the case; time limitations imposed by the client or the circumstances.* Although this case did not foreclose any other business for counsel due to conflicts of interest, the time spent on the case over the months appeared to preclude Mr. Pannill and Mrs. McCreary from engaging in other work. Counsel undoubtedly gave this matter high priority, and due to the emergency basis on which some portions of the suit had to be conducted, work-

ing on the case required counsel to expedite or delay other work.

5. *The amount involved and the results obtained.* Although no damages were requested or are to be awarded in this case, the Plaintiffs did succeed in enjoining the operation of the WISD Board of Trustees which was elected by unlawful means. This success on the merits preserves important constitutional rights embodied in the Fifteenth Amendment and the Voting Rights Act of 1965, as amended.

6. *The "undesirability" of the case.* Counsel's representation of the Coalition occasionally was received unpleasantly by the community and by clients of the firm. Representation of the Coalition had an adverse economic impact on the firm's practice on at least one occasion, when a client ceased to use the firm after learning of its representation of the Coalition.

7. *The nature and length of the professional relationship with the client.* This standard is not a relevant factor in the determination of fees in this case. The Coalition was formed to oppose the Westheimer elections and its existence will no doubt cease when the litigation has ended.

8. *The customary fee; the experience, reputation, and ability of the attorneys; whether the fee is fixed or contingent; awards in similar cases.* The Plaintiff has been ably served by its attorneys who skillfully met the substantive and procedural challenges presented in this case. Regarding the customary fee for similar work in the community, the Court finds that $100 an hour for work on the merits is a reasonable rate for Mr. Pannill's time. This rate of course will be adjusted downward for informal communications and non-legal work. Mr. Pannill's qualifications, along with those of the other attorneys involved, appear in Exhibit C to the Plaintiff's Motion for Award of Attorneys' Fees. William Pannill, lead attorney for the Coalition, is a 1970

graduate of the University of Texas School of Law. He maintains an active federal practice and is admitted to practice before the United States Supreme Court, in addition to other federal courts.

Jacqueline McCreary is a 1971 graduate of the University of Texas School of Law. The Court finds that $75 an hour is a reasonable and customary fee for her work related to the merits. Miss Perkins is a 1975 graduate of the University of Houston's Bates College of Law. Mr. Catron was graduated from the University of Texas School of Law in 1976. Fees of $50 per hour for these attorneys are reasonable for cases of this nature litigated in this District.

In determining whether the fee was fixed or contingent, the Court is mindful of the directive of the *Johnson* court concerning fee contracts, *Johnson* v. *Georgia Highway Express, Inc., supra,* at 718, and points out that in the Motion for Award of Attorneys' Fees, a fee of $50 per hour once was characterized as an "amount agreed on." The Court, however, has considered the total discussion pertaining to a fee agreement that is included in the Motion. Accordingly, the Court agrees with the Coalition's attorney that $50 per hour was not an agreed fee, but merely reflected the limitations of the Coalition's financial capability. The Court, therefore, concludes that Mr. Pannill was not working for the Coalition pursuant to any contractual agreement constituting a fixed maximum fee. The special circumstances of this case render the hourly rates explained above reasonable. Such an award serves the congressional purpose of granting fees commensurate with those in other types of equally complex federal litigation. [1971] U. S. Code Cong. & Ad. News at 808. The fee is not to be reduced because the rights involved are nonpecuniary in nature. *Id.* As examples of fee awards in similar cases, the Plaintiff's attorneys cite *Guajardo* v. *Estelle,* 432 F. Supp. 1373 (S.D. Tex. 1977), *modified on other grounds,* 580 F.2d 748 (5th

Cir. 1978), the Memorandum Concerning Motions for Costs and Attorneys' Fees, *Ross* v. *Houston Independent School* District (C.A. No. 10,444, February 1, 1979), and the June 4, 1979 Order Concerning Assessment of Attorneys' Fees in *Ross* v. *Houston Independent School District, supra.*

Having considered the above factors, and based both on this Court's experience and familiarity with the fees charged in this legal community, and on the standard provided in *Cruz* v. *Beto,* 453 F. Supp. 905, 910-11 (S.D. Tex. 1977), *aff'd,* 603 F.2d 1178, 1186 (5th Cir. 1979), the Court has arrived at the following hourly rates. Mr. Pannill's time should be valued at $100 per hour for work related to the merits, $85 per hour for informal communications, and $20 per hour for non-legal work. *See Johnson* v. *Georgia Highway Express, Inc., supra,* at 717: "[The] dollar value [of non-legal work] is not enhanced just because a lawyer does it." *Id.* at 717. Mrs. McCreary should receive an hourly rate of $75 for work related to the merits, $60 for informal communications, and $20 for non-legal work. Miss Perkins' and Mr. Catron's time should be valued at $50 an hour for work on the merits and at $30 an hour for informal communications. Paralegals should be compensated at $20 per hour. The total amount due for the claimed hours computes as follows:

	Work on merits	Informal Comm.	Non-Legal Work	Less Discount	Total Comp.
William Pannill	151.50 x $100	145.75 x $85	11.5 x $20	0	$27,768.75
Jacqueline McCreary	100 x $ 75	20.5 x $60	6.75 x $20	0	$ 8,865.00
Susan Perkins	24 x $ 50	.5 x $30	—	10%	$ 1,093.50
Gary Catron	64 x $ 50	2.75 x $30	—	10%	$ 2,954.25
Paralegals			105.25 x $20		$ 2,105.00
Expenses					$ 1,697.71
GRAND TOTAL					$44,484.21

Therefore, it is ORDERED, ADJUDGED and DECREED that the Plaintiff Coalition's Motion for Judgment is hereby GRANTED, that the Plaintiff United States' Motion for Entry of Judgment is hereby GRANTED,[11] and that the Plaintiff Coalition's Motion for Award of

---

[11] In the Defendant's Opposition to Plaintiff's Motion for Judgment the Defendant asserts that there are still sixteen defenses to be ruled upon by a proper court. Two of the defenses advanced are that all of the material fact issues in this case have been decided adversely to the United States' position in *Ross* v. *Houston Independent School Dist.*, 583 F.2d 712 (5th Cir. 1978), and in the Coalition's case against WISD, C.A. No. H-77-92, and that relitigation of these issues is barred because of the doctrines of collateral estoppel and *res judicata*. These doctrines do not bar the present litigation. The court in *Ross* made the determination that a permanent injunction against WISD's status as a validly created school district under state law is excessive and must be vacated. 583 F.2d at 716. The question of the application of the Voting Rights Act to the district and its January 15, 1977 election was not addressed. *See Ross* v. *Houston Independent School Dist.*, 559 F.2d 937, 945 (5th Cir. 1977). The issues in C.A. No. H-77-92 were not decided adversely to the Plaintiff's position and no final judgment was entered in that action. The appeal of Judge Hannay's order denying a temporary restraining order and the convening of a three-judge court was dismissed without prejudice to the Coalition's right to renew its request for a three-judge court at the district court level. Judge Hannay's order was vacated and Chief Judge Brown responded to Judge Noel's request for a three-judge court by consolidating the combined Westheimer cases (C.A. No. H-77-92 and C.A. No. H-77-121) with the *Hereford* cases in the Northern District of Texas. The Westheimer cases are now ripe for the entry of Final Judgment. The proper court to rule upon any other issues presented by the Defendant's enumerated defenses, which have not already been resolved by the Supreme Court in *Sheffield*, by the three-judge court in *Hereford*, or by this Court, is a three-judge District Court for the District of Columbia, 42 U.S.C. § 1973c; H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 2437, 2458.

Attorneys' Fees is hereby GRANTED to the extent herein expressed.

Signed this 1st day of July, 1980.

JOHN R. BROWN
United States Circuit Judge

CARL O. BUE
United States District Judge

ROBERT O'CONOR, JR.
United States District Judge

APPENDIX B

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

HEREFORD INDEPENDENT SCHOOL DISTRICT, et al.,
Plaintiffs,
v.
GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, et al.,
Defendants.

CIVIL ACTION
NO. CA-2-77-14
ALL CASES

MEMORANDUM AND ORDER

The decision and opinion of The United States Supreme Court in *United States of America* v. *Commissioners of Sheffield, Alabama, et al.,* (No. 76-1662, March 6, 1978), disposes of the threshold question in these consolidated cases. This court therefore holds that municipalities and school districts in the State of Texas are "political subdivisions" as that term is defined in Section 14(c)(2) of the Voting Rights Act of 1965, as amended. As such these entities are subject to the provisions of Section 5 of the Act when said entities enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure, with respect to voting different from that in force or effect on November 1, 1972.

Further this court is of the opinion that the application of Section 5 of the Act, as amended, to the municipality and school districts involved in the case *sub judice* is not retroactive in effect, and thus not violative of the ex post facto provision of Article I, § 9 of the United States Constitution or the due process clauses of the Fifth and Four-

teenth Amendments. It is contended that the changes in the respective election procedures were enacted subsequent to November 1, 1972 but prior to August 6, 1975 (the date the Act became applicable to the State of Texas), and therefore these particular changes could be implemented without compliance with Section 5 of the Act. The theory is that Section 5 of the Act did not become applicable to these entities until after their election procedures were changed, therefore any enforcement of that section as to them is necessarily retroactive. This court cannot agree.

Section 5, by its terms, prohibits a political subdivision from enacting or *seeking to administer* any voting change different from that in effect on November 1, 1972 without first obtaining "preclearance" from the Attorney General or a declaratory judgment from the District Court of the District of Columbia declaring that such a change does not have the purpose or effect, *inter alia,* of denying or abridging the right to vote on account of race or color. Prohibiting political subdivisions from administering a voting change, that is, conducting an election pursuant to election changes enacted after November 1, 1972 but before the date of the applicability of the Act to such political subdivisions, does not have the effect of applying Section 5 retroactively, but rather such prohibition is prospective for the reason that such political subdivisions are prohibited only from conducting elections pursuant to such enactments in the future, and no past actions are proscribed.

Therefore the court finds that the municipality and school districts herein should be permanently enjoined from conducting elections under the changed procedures until and unless, with respect to the election procedures enacted after November 1, 1972, these entities comply with Section 5 of the Voting Rights Act of 1965, as amended.

Nothing herein shall be construed as invalidating any actions, which were otherwise lawful, taken or performed

prior to this date by any officials heretofore elected to office in elections conducted pursuant to election procedures enacted by these entities after November 1, 1972.

The attorneys in each of the cases which have been consolidated under the above number will confer with opposing counsel and counsel for the United States will prepare and submit proposed judgments in each case not inconsistent with this opinion and which judgments shall provide, where applicable, the following:

1. A declaration that the Voting Rights Act of 1965 applies to school districts and municipalities in the State of Texas.

2. That the Voting Rights Act of 1965 is applicable even though the change in election procedures was enacted by the governing board before the date that the Act became effective to Texas and subsequent to November 1, 1972.

3. The injunctions in the *Gomez* v. *Galloway* and *Hawkins Independent School District* cases will be made permanent.

4. The court refuses to certify any class action in *Gomez* v. *Galloway,* No. 76-C-146, and finds that a reasonable attorney's fee that defendants are required to pay to the attorneys for plaintiffs in this case is the sum of $7,500.00 which is here ordered to be paid by defendants to said attorneys in this case.

5. In the *Midland* and *Hereford* cases a permanent injunction will be entered prohibiting these entities from seeking to administer or holding any further election under the changed voting procedures enacted by these entities subsequent to November 1, 1972 until and unless all of the provisions of the Voting Rights Act of 1965 are complied with.

6. Any other relief requested and prayed for is denied except that as specifically set forth above.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 2nd day of June A.D., 1978.

IRVING L. GOLDBERG
Circuit Judge

HALBERT O. WOODWARD
District Judge

PATRICK E. HIGGINBOTHAM
District Judge

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, *Plaintiff*, vs. INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant*,	CIVIL ACTION NO. H-77-92
and	
UNITED STATES OF AMERICA, *Plaintiff*, vs. WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant*,	CIVIL ACTION NO. H-77-121 CONSOLIDATED NO. CA-2-77-14 In the United States District Court for The Northern District of Texas, Dallas Division

ORDER

The above cases were consolidated for trial before a three-judge court in the Northern District of Texas and the common questions of law that were present in all of the cases have been presented to said three-judge court and a memorandum opinion was entered by the court, which is attached hereto and referred to for all purposes.

It appears that this memorandum and ruling of the three-judge court is decisive of all issues to be determined by this

three-judge court in the cases from the Houston Division of the Southern District of Texas. It is further known that there are other cases involving the Houston and Westheimer Independent School Districts on the docket of the Houston Division of the Southern District of Texas, and not before this court, but this court is of the opinion that final judgment should be entered in the above cases by the Southern District of Texas rather than this three-judge court as it may have some bearing on these related cases.

Therefore, each of the above cases is remanded to the Southern District of Texas for judgment to be entered by the Southern District of Texas in accordance with the attached decision and opinion in the consolidated cases.

The Clerk will furnish a copy hereof to all attorneys and will remand each of the cases together with a copy of this order to the Southern District of Texas.

ENTERED this 12th day of September A.D. 1978.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX C

United States District Court

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, *Plaintiff*, vs. INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant*,	CIVIL ACTION NO. H-77-92
and	
UNITED STATES OF AMERICA, *Plaintiff*, vs. WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant*,	CIVIL ACTION NO. H-77-121

FINAL JUDGMENT

This action having come on for hearing before the three-judge District Court for the Northern District of Texas and a Memorandum and Order having been entered by that Court on June 2, 1978, and in accordance with this Court's Memorandum and Order of even date herewith, entered after this Court's hearing of the matter on May 2, 1980.

It is ORDERED, ADJUDGED and DECREED that

1. The Voting Rights Act of 1965, as amended, applies to school districts in the State of Texas.

2. The Voting Rights Act of 1965, as amended, applies to changes in election procedures enacted or administered subsequent to November 1, 1972 and before the date that the Act became applicable to Texas, as well as to voting changes occurring after that date.

3. The official body of the State of Texas known as the Interim Board of Trustees of the Westheimer Independent School District and each of its members, Joel B. Coolidge, Jackie Day, Arthur Alvarez, William Hoffman, and their agents and successors in office, are hereby permanently restrained and enjoined from taking any action to conduct any election for or on behalf of the Westheimer Independent School District under changed voting procedures enacted subsequent to November 1, 1972 unless and until all of the provisions of the Voting Rights Act of 1965, as amended, are complied with.

4. The election conducted by the Interim Board of the Westheimer Independent School District on January 15, 1977, pursuant to its election orders of October 14, 1976, November 11, 1976, and December 9, 1976 violated the Constitution and laws of the United States. The election results are hereby set aside and the election declared null and void and of no legal force or effect.

5. The corporate body formed pursuant to the unlawful election held on January 15, 1977 known as the Permanent Board of Trustees of the Westheimer Independent School District hereby is ordered dissolved and all acts of the said body are set aside and each of the members of the Permanent Board, Joel B. Coolidge, George J. Kostas, R. M. Johnson, Wiley B. Harle, Jim Lederer, William N. Wilson, and Don R. Mabry are hereby restrained and enjoined from acting in concert as a body corporate and politic of the State of Texas styling itself the Board of Trustees of the

Westheimer Independent School District or as members or officers of such a body.

6. The Westheimer Independent School District and the members of its Board of Trustees, interim or permanent, and their successors in office, are hereby ordered to collect and surrender to the Clerk all ballots, canvass sheets, and other voting material used or connected with the unlawful election of January 15, 1977.

7. The Permanent Board of Trustees of the Westheimer Independent School District and each of its members are hereby ordered to collect and surrender to the Clerk the records, cancelled checks, contracts, correspondence, minutes, and other documents of any kind pertaining to the Westheimer Independent School District since the January 15, 1977 election.

8. The Plaintiff Coalition to Preserve Houston and the Houston Independent School District is hereby awarded a reasonable attorneys' fee of $44,484.21 together with all costs of court, such attorneys' fees and costs to be satisfied out of funds of the Westheimer Independent School District and its Interim Board of Trustees, and their successors in office in their official capacities.

Signed this 1st day of July, 1980.

JOHN R. BROWN
United States Circuit Judge

CARL O. BUE
United States District Judge

ROBERT O'CONOR, JR.
United States District Judge

United States District Court

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, *Plaintiff,* vs. INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant,*	CIVIL ACTION NO. H-77-92
and	
UNITED STATES OF AMERICA, *Plaintiff,* vs. WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant.*	CIVIL ACTION NO. H-77-121

ORDER

Defendant's Motion for Rehearing is hereby DENIED.

Signed this 27th day of August, 1980.

ROBERT O'CONOR, JR.
United States District Judge

APPENDIX D

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, DR. GURNEY F. PEARSALL, AND DANNY LAWSON, *Plaintiffs,* v. INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, ET AL. *Defendants,*	CIVIL ACTION NO. H-77-92
and	
UNITED STATES OF AMERICA, *Plaintiff,* v. WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant.*	CIVIL ACTION NO. H-77-121 CONSOLIDATED NO. CA-2-77-14 In the United States District Court for The Northern District of Texas, Dallas Division

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Coalition to Preserve Houston and the Houston Independent School District, the plaintiff in the above cause H-77-92, hereby appeals to the Supreme Court of the United States from that portion of

the Final Judgment entered in the consolidated action on July 1, 1980, concerning the award of attorneys' fees.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

PANNILL AND HOOPER

By .....

WILLIAM PANNILL
1100 Milam Building,
Suite 580
Houston, Texas 77002
(713) 659-8090

Attorney for Coalition to Preserve Houston and the Houston Independent School District

PROOF OF SERVICE

I, William Pannill, the attorney for the Coalition to Preserve Houston and the Houston Independent School District, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 25th day of August, 1980, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, on all the parties thereto pursuant to Rule 33(b)(3)(b), as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Interim Board of Trustees of the Westheimer School District and the Westheimer Independent School District, Defendants, by mailing a copy in a duly addressed envelope, with first class postage prepaid to

Charles W. Kelly, Esquire
Ross, Griggs, and Harrison
2600 Two Allen Center
Houston, Texas 77002

Ann Kraatz, Esquire
Assistant Attorney General
Supreme Court Building, Room 417
Austin, Texas 78701

Elton O. Bowen
Commissioner of Education
Texas Education Agency
201 East 11th Street
Austin, Texas 78701

Mr. Edgar Reeves, Chairman
Harris County Board of Education
6515 Irvington
Houston, Texas 77022

It is further certified that all parties required to be served have been served.

WILLIAM PANNILL
PANNILL AND HOOPER
1100 Milam Building,
Suite 580,
Houston, Texas 77002
(713) 659-8090

Attorney for Coalition to Preserve Houston and the Houston Independent School District

Filed on August 25, 1980, in the United States District Court, Southern District of Texas

D-5

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, DR. GURNEY F. PEARSALL, AND DANNY LAWSON, *Plaintiffs,* vs. INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, ET AL., *Defendants,*	CIVIL ACTION NO. H-77-92

and

UNITED STATES OF AMERICA, *Plaintiff,* vs. WESTHEIMER INDEPENDENT SCHOOL DISTRICT, *Defendant,*	CIVIL ACTION NO. H-77-121 CONSOLIDATED NO. CA-2-77-14 In the United States District Court for The Northern District of Texas, Dallas Division

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Coalition to Preserve Houston and the Houston Independent School District, the plaintiff in the above cause H-77-92, hereby appeals to the Supreme Court of the United States from that portion of the Final Judgment entered in the consolidated action on July 1, 1980, concerning the award of attorneys' fees. Defendant's Motion for Rehearing was denied on August 27, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

PANNILL AND HOOPER

By .....

WILLIAM PANNILL
1100 Milam Building,
Suite 580
Houston, Texas 77002
(713) 659-8090

Attorney for Coalition to Preserve Houston and the Houston Independent School District

PROOF OF SERVICE

I, William Pannill, the attorney for the Coalition to Preserve Houston and the Houston Independent School District, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16th day of October, 1980, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, on all the parties thereto pursuant to Rule 33(b)(3)(b), as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Interim Board of Trustees of the Westheimer School District and the Westheimer Independent School District, Defendants, by mailing a copy in a duly addressed envelope, with first class postage prepaid to

Charles W. Kelly, Esquire
Ross, Griggs, and Harrison
2600 Two Allen Center
Houston, Texas 77002

Gregory Wilson, Esquire
Assistant Attorney General
Supreme Court Building, Room 417
Austin, Texas 78701

Elton O. Bowen
Commissioner of Education
Texas Education Agency
201 East 11th Street
Austin, Texas 78701

Mr. Edgar Reeves, Chairman
Harris County Board of Education
6515 Irvington
Houston, Texas 77022

It is further certified that all parties required to be served have been served.

WILLIAM PANNILL
PANNILL AND HOOPER
1100 Milam Building,
Suite 580,
Houston, Texas 77002
(713) 659-8090

Attorney for Coalition to Preserve Houston and the Houston Independent School District

Filed on October 20, 1980, in the
United States District Court,
Southern District of Texas

APPENDIX E

COALITION TO PRESERVE HOUSTON & H.I.S.D.*

The Coalition to Preserve Houston & H.I.S.D., as reflected by its Advisory Committee, is representative of the significant religious, ethnic, and political segments of the community. Its members include leading businessmen, community leaders, elected officials, former liberal and conservative school board members, leaders in the Republican and Democratic parties, educators, labor leaders, clergymen, professional people, parents of children in the Houston, Spring Branch, and the proposed Westheimer school districts, organizations of parents, teachers, and administrators, and community and social organizations as well. A partial list of members follows:

Mr. & Mrs. Marquis Alexander
ACRES HOME COMMUNITY RELATION CLUB
Walter P. Allen
AMERICAN JEWISH COMMITTEE
Edna T. Anderson
Madeleine Appel
Roger D. Armstrong
David & Susie Askanase
Reuben Askanase
Rilla Askew
Hines H. Baker, Jr.
County Commissioner Tom Bass
Carrie Lee Bedford
Adelyn Bernstein
Milton S. Berman
Bob & Vicki Birenbaum
Jack S. Blanton
Jake & Henrietta Blend
Mr. & Mrs. Ben Blum
Mildred Bohn
Mrs. David Bourgin
Jessie Bridgwater
Travis Broesche
State Senator Chet Brooks
Ms. Penny Brown
Mr. & Mrs. B. J. Brown
J. P. Bryan, Jr.
Lorraine Burling
Madgelean Bush
J. R. Butler
James Calloway, PhD.
William & Virginia Camfield
L. W A. (Bud) Campbell
Dr. Harry Caplovitz
Sadie Aaron Caplovitz, D.Ed.
Dorothy Caram
John Castillo
Leonel Castillo
Dick Cate
CHICANO TRAINING CENTER
CITIZENS FOR GOOD SCHOOLS
Edward Cline, Pres. HOUSTON PRINCIPALS ASSOCIATION
Bill & Martha Coats
Margaret Covington, Pres. HOUSTON TEACHERS ASSOCIATION
Jim & Millie Cowen
Mrs. Hardin Craig, Jr.
Robert Darden
Jonathan Day
The Rev. & Mrs. Paul Debenport
Ralph Dickinson
Lucille DiDomenico

* Exh. A to Plaintiff's Complaint filed January 14, 1977, in No. H-77-92.

Chris & Katy Dixie
George & Gwen Dixie
Dr. Hortense Dixon
Dr. George E. Dodd
Robert Gordon Durst
Arezella Eddings
Emile J. Farge, PhD.
Effie G. Feld
Stuart & Barbara Ferer
Mrs. Yolanda N. Flores
Mrs. Harry Folloder
Dr. Marion Ford
Mr. & Mrs. William A. Fowler, Jr.
Felix Fraga
Phillip Frank
J. Kent Friedman
Ernest O. Garcia
Hector Garcia
Mrs. Ernestine Gee
Arthur Goldblum
Mr. & Mrs. Louis Goldfaden
Leonard & Jan Goldstein
Jeannie Kamrath Gonzalez
David Gottlieb, PhD.
Mickey & Noel Graubart
GREATER FIFTH WARD CITIZENS LEAGUE
GREATER HOUSTON CLERGY ASSOCIATION
Art Greer
Pearson Grimes
Marc E. Grossberg
Hugh & Janet Hackney
State Representative Anthony Hall, Jr.
Robert E. Hall
Mr. & Mrs. John Hannah
John & Mary Margaret Hansen
Barbara Hanson
Franklin I. Harbach
HARRIS COUNTY AFL-CIO
Louis Harris
Pat Hart
Edward F. Hecht
Mrs. J. D. Hellums
Forrest Henry, Jr.
D. Sloan Hill
Derby Hirst
Barbara Hoffstein
Mayor Fred Hofheinz
June Holly
Donald A. Horn
Mr. & Mrs Michael Horvit
HOUSTON AREA COUNCIL OF BILINGUAL EDUCATORS
HOUSTON AREA URBAN LEAGUE
HOUSTON ASSOCIATION OF MEXICAN AMERICAN EDUCATORS
HOUSTON CITY COUNCIL PTA Exec. Com.
HOUSTON COUNCIL ON HUMAN RELATIONS
HOUSTON FEDERATION OF TEACHERS
HOUSTON PRINCIPALS ASSOCIATION, Executive Committee
HOUSTON RESIDENTS CITIZEN PARTICIPATION COMMISSION
HOUSTON TEACHERS ASSOCIATION
HOUSTON URBAN BUNCH, INC.
John D. & Sally Hughes
Mary C. Jackson
Andrew L. Jefferson, Jr.
The Rev. Lynn T. Johnson
Vivian Johnston
State Senator Gene Jones
Dr. J. B. Jones
Walter L. Jones
Mr. & Mrs. Lawrence Kagan
Rabbi Robert I. Kahn
Jack Kamrath
Rabbi Samuel Karff
Stephen & Ann Kaufman
Mrs. J. L. Keeper
Sam Keeper
Otis H. King
Alice Kinney
The Rev. Cliff Kirkpatrick
Mr. & Mrs. Livingston Kosberg
Maurice Krinsky
Mr. & Mrs. Sanford Lack
Stuart Lang
The Rev. Sam Lanham
Pat Laughlin
The Rev. Bill Lawson
LEAGUE OF WOMEN VOTERS
Moses Leroy

Dr. Stuart Levinson
Elizabeth Levy
Philip Libby
Marilyn Little
David T. Lopez
Tom Forrester Lord
Eddie Mae Loston
Mr. & Mrs. Milton D. Lower
MAS ASSOCIATES
Mel Maltz
David & Miriam Mandell
James L. Marshall
Barbara Marshall
Larry Marshall, Chairman
HOUSTON ALLIANCE OF BLACK EDUCATORS
MARTIN LUTHER KING, JR., COMMUNITY CENTER
Helen Martin
Mel & Linda May
Mr. & Mrs. Hans Mayer
Dr. Julia Mazow
Quentin R. Mease
Mary Medler
Stan Merriman
Howard Middleton
J. E. Middleton
Jerald D. Mize
Dr. Robert Moffett
Mr. & Mrs. Barry Moore
Harvin & Nancy Moore
The Rev. Prentis Moore
Mr. & Mrs S. I. Morris
John D. Mullins
Martha Murphree
Charles G. McCarthy
Charles Nathan
NATIONAL COUNCIL OF JEWISH WOMEN
Robert L. Navarro
Dan T. Neale
Mr. & Mrs. Thomas Neumann
Mrs. M. Jack Newman
Dr. & Mrs. Joe Nogee
Mark Olson
Stewart Orton
Mrs. Overnice Osborne
George Oser, PhD.
POLITICAL ASSOCIATION OF SPANISH SPEAKING ORGANIZATIONS
Mary Parker
C. Herbert Paseur
Dr. & Mrs. Gurney Pearsall
Judge John Peavy
J. W. Peavy
Mrs. Marcella Perry
Ms. Sue Ann Peterkin
The Rev. Edwin Peterman
Louis Peters
Mr. & Mrs. George F. Pierce, Jr.
Dr. Richard Plumb
H. J. (Jack) Porter
Mr. & Mrs. James W. Porter
Hartford Prewett
Floyd Priester
Rabbi Joseph Radinsky
Clara Radoff
Sydney Rawitscher
State Representative Ben T. Reyes
Frumencio Reyes, Jr.
Tina Reyes
Ms. Diane Richards
Mrs. H. Mitlon (Gene) Richardson
Mrs. Oralia Rios, Pres. HOUSTON AREA COUNCIL OF BILINGUAL EDUCATORS
Dr. Leonard Robbins
Enid Rosenfeld
Ms. Bobbie N. Ross
Rabbi Robert Rozenberg
R. Alan Rudy
Ms. Donna Rybiski
Barbara Sachnowitz
Vic & Bobbi Samuels
SAN JACINTO COUNCIL OF PTA'S
Marion & Judy Sanford
Helen G. Schaffer, M.D.
Mr. & Mrs. Richard Schmeal
Frank & Irene Schneider
Ellen Schroeder
Al Schulman
Dr. & Mrs. Frank Schulman
Mrs. Sue Scott
Ms. Rosemary Scott

Rabbi Jack Segal
SER — JOBS FOR PROGRESS OF HOUSTON
Vic & Marcia Shainock
Richard Shaw, Pres. HOUSTON FEDERATION OF TEACHERS
Dan H. Shepler
The Rev. H Richard Siciliano
Miles & Ann Raun Simmons
Federico Souflee, Jr.
Lawrence D. Spencer
Dr. & Mrs. Ty Sponcell
Stephen Susman
Mrs. Jolene Thompson
Jim & Eleanor Tinsley
H. Michael Tyson
Ernesto Valdes
George Valdez
V. Richard Viebig, Jr.
William A. Walker
State Representative Ralph Wallace
The Rev. Albert Walling
Harry W. Wallingford
Rabbi Roy Walter
State Representative Craig Washington
Mark & Maureen Waterman
State Representative Ron Waters
Edward V. Wedin
Rabbi Norbert Weinberg
Alfred Weinzierl
Asa Weldon
Mrs. Charles E. White
Ms. Mary Jane White
Martha Whiting
Dr. Joseph Wiesenthal
Mrs. J. H. Wilkenfeld
Charles R. Williams
WOMEN IN ACTION
John Paul & Ginia Wray Wright
Rabbi Herbert Yoskowitz
Richard Zamora

NO. 80 - 697

Supreme Court, U.S.
FILED
DEC 1 1980
MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants

V.

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees

On Appeal From The United States District Court For The Southern District Of Texas

---

MOTION TO DISMISS

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

LONNY F. ZWIENER
Assistant Attorney General

GREGORY WILSON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for State of Texas and Texas Education Agency

QUESTION PRESENTED

Whether this Honorable Court has jurisdiction under 28 U.S.C. §1253 to hear an appeal from an order denying the recovery of attorneys' fees from certain non-parties in the trial below.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATUTORY PROVISION 2

SUMMARY OF ARGUMENT 2

ARGUMENT 2

CONCLUSION 3

CERTIFICATE OF SERVICE 4

TABLE OF CASES

Cases **Pages**

Gunn v. University Committee To End The War In Viet Nam, 399 U.S. 383 (1970) 2

Perez v. Ledesma, 401 U.S. 82 (1971) 2

Roe v. Wade, 410 U.S. 113 (1973) 3

White v. Regester, 412 U.S. 755 (1973) 3

White v. Regester, 412 U.S. 755 (1973) 3

Statutory Provisions

28 U.S.C. § 1253 ..... i,2

NO. 80-697

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants

V.

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees

MOTION TO DISMISS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COME Appellees the State of Texas (the "State") and the Texas Education Agency ("TEA") and make this their Motion to Dismiss the appeal of Appellants Coalition to Preserve Houston and the Houston Independent School District, et al. (the "Coalition").

STATEMENT OF THE CASE

On July 1, 1980 the three-judge District Court below granted the relief requested by the Coalition, declared that the Westheimer Independent School District (the "District") had been created illegally, dissolved the District and enjoined the members of the Board of

Trustees of the District from, among other things, acting in concert as the Board of Trustees.

That part of the order granting injunctive relief is not here appealed from.

The District Court also partially granted the Coalition's Motion for Attorneys' Fees but refused the Coalition's request that recovery of the award be allowed against the State or TEA.

STATUTORY PROVISION

28 U.S.C. § 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

SUMMARY OF ARGUMENT

A denial of a motion to award attorneys fees is not a denial of an injunction and is not appealable directly to this Court under 28 U.S.C. § 1253.

ARGUMENT

This is not an appeal from the grant or denial of an interlocutory or permanent injunction by a three-judge panel. Appellant obtained the injunctive relief it sought below.

Rather, this appeal is from an order of the three-judge court denying Appellant recovery of attorneys' fees from the State and TEA. Such an order does not satisfy the requirements of 28 U.S.C. § 1253 and, consequently, this Court is without jurisdiction of the appeal. *Gunn v. University Committee To End The War In Viet Nam*, 399 U.S. 383 (1970); *Perez v. Ledesma*, 401 U.S. 82 (1971).

The District Court's decision not to allow recovery of attorneys' fees from the State and TEA was unrelated to the decision regarding injunctive relief. The issue in this appeal is not comparable to those in *Roe v. Wade*, 410 U.S. 113, 123 (1973) and *White v. Regester*, 412 U.S. 755 (1973) in which appeal from declaratory judgments was allowed where the declaratory judgments and injunctions appealed from were based upon the same operative facts and legal theories.

CONCLUSION

For the reason stated, the appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

LONNY F. ZWIENER
Assistant Attorney General

GREGORY WILSON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys For The State Of Texas and Texas Education Agency

CERTIFICATE OF SERVICE

This is to certify that 3 true and correct copies of the foregoing Motion to Dismiss have been sent by United States Postal Service, Certified, Return Receipt Requested, this _____ day of November, 1980, to:

Mr. William Pannill
Pannill & Hooper
100 Milam Building
Suite 580
Houston, Texas 77002

Mr. Alton O. Bowen
Commissioner of Education
Texas Education Agency
201 East 11th Street
Austin, Texas 78701

Mr. Charles W. Kelly
Ross, Griggs & Harrison
2600 Two Allen Center
Houston, Texas 77002

Mr. Edgar Reeves, Chairman
Harris County Board of
Education
6515 Irvington
Houston, Texas 77002

LONNY F. ZWIENER
Assistant Attorney General

see 805